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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/877,439	06/08/2001	Hans-Linhard Reich	17209-019	1544

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CHADBOURNE & PARKE LLP
30 ROCKEFELER PLAZA
NEW YORK, NY 10112

EXAMINER	
DASS, HARISH T	

ART UNIT	PAPER NUMBER
3693	

MAIL DATE	DELIVERY MODE
01/09/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

Advisory Action Before the Filing of an Appeal Brief	Application No. 09/877,439	Applicant(s) REICH ET AL.	
	Examiner Harish T. Dass	Art Unit 3693	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 12/12/07 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☐ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:
   a) ☐ The period for reply expires _____months from the mailing date of the final rejection.
   b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

   Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
   (a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
   (b) ☐ They raise the issue of new matter (see NOTE below);
   (c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
   (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

   NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).
4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
   The status of the claim(s) is (or will be) as follows:
   Claim(s) allowed: _____.
   Claim(s) objected to: _____.
   Claim(s) rejected: _____.
   Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: see paper number 20061003.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____
13. ☒ Other: See Continuation Sheet.

James Kramer 1/8/07

Continuation of 13. Other: In response to applicant's argument, examiner provides an article which shows what examiner stated in his rejection. An article "Typical Brokerage Firm Operations and Compliance Issues and Procedures" by Mark J. Astarita, Esq, 1995 Attached.

ATTACHMENT: Next page

Attachment 09/877,439

Typical Brokerage Firm Operations and Compliance Issues and Procedures

The brokerage industry is subject to a vast array of rules and regulations, from a wide variety of regulatory agencies, including the Securities and Exchange Commission ("SEC"), the Federal Reserve, the various self-regulatory organizations ("SRO"), including, but not limited to the National Association of Securities Dealers ("NASD"), and the New York Stock Exchange ("NYSE") as well as the Securities Commission in every state where the broker or his firm has customers, has an office, or solicits prospective customers.

It is well beyond the scope of this document to identify all of the applicable regulations which govern the industry, nor the procedures employed by firms to insure their compliance. However, for educational and informational purposes, we include here the major regulatory concerns relating to the operation of a broker-dealer, the rules from which the concerns arise, and examples of the procedures employed most firms to deal with the more significant rules and regulations. The reader is encouraged to examine the rule himself, and to engage competent counsel if procedures are required to comply with these regulations.

Registered representatives are reminded that should always check their own firm's manual for the firms specific procedures, which may differ from those here, and from another firm's procedures, on an identical issue.

NET CAPITAL COMPLIANCE REPORTS

The Net Capital Rule -- Rule 15c3-1 of the 1934 Act requires a brokerage firm to maintain minimum net capital levels based upon a brokerage firm's activity and Rule 17a-11 requires a brokerage firm to report instances of net capital deficiencies to the SEC and NASD.

RECEIPT OF CUSTOMER FUNDS AND SECURITIES

Brokerage firms who do not "self-clear" are prohibited from accepting checks, cash or securities from their customers, and same must be forwarded to the clearing firm. In the

case of firms who do self-clear, the checks are typically received in a designated location, separate and apart from the retail brokers.

In either case, Registered Representatives should never be the person receiving checks, cash or securities from a customer. If such receipt is unavoidable, same should be immediately be turned over to the supervisor of the branch office.

Rule 15c3-3 of the 1934 Act requires that customer funds and/or securities be transmitted to a brokerage firm's clearing agent(or the sponsor in the case of mutual funds) or the escrow agent for private offerings not later than noon of the business day following receipt.

Customer Complaints

A brokerage firm has an obligation to make internal inquiries and to respond to customer complaints as defined in Article III, Section 21(I) of the NASD Rules of Fair Practice. In investigating complaints and making the appropriate response, the ultimate goals of the firm are typically two-fold: (a) when practicable and reasonable, to amicably resolve all customer disputes, and (b) uncover problem areas that may need to be rectified in the firm, or the a particular broker's activities.

Brokerage firms typically designate a Compliance Officer to be responsible for investigating customer complaints, making the appropriate response (or seeing that it is made) and keeping a record of same.

STATE SECURITIES LAWS

While most broker-dealers are registered in all 50 States, the Regional firms, and some of the boutique firms only register in the states where they maintain offices, and where their customers reside. It is important to note that a broker-dealer, and its registered representatives MUST be registered in each state where it has customers, and often, depending on the particular state, where is is going to solicit business.

These state regulations, known as the Blue Sky laws, are particular and different for each and every state in the country. Some states do not require any specific filing at all, some have their own forms for registration, some states require firms and brokers to register if they have a single customer in the state, some exempt firms with less than three or five customers. Some states even require registration in the state if a broker-dealer, or registered representative, intends to

make any solicitations in the state, even if the firm or rep does not have any customers in the state.

Penalties for not registering in a particular state can be severe, and could result in a loss of a broker's license, and might give customers of the broker in that state the ability to rescind particular trades.

Therefore, brokerage firms who are not registered in all states maintain a list of states where a brokerage firm is registered and have policies in place to insure that its representatives are aware of the list. Many firms typically have computer systems set up, which are designed to cross match trades with registered states, at the time they are entered, to further insure that such transactions do not occur.

PUBLIC OFFERINGS: PUBLIC OFFERINGS OF SECURITIES OF BROKER/DEALERS: PRIVATE PLACEMENTS

A public offering typically goes through the following stages at a brokerage firm.

- 1. Execution of the Letter of Intent (all offerings);
- 2. Filing of a Registration Statement (for public offerings);
- 3. Circulation of a Preliminary Prospectus (for public offerings);
- 4. Effectiveness of a Registration Statement (for public offerings);
- 5. Commencement of the offering (for private placements); and
- 6. Closing of the offering (all offerings).

Brokerage firms must typically address each of the following issues in every offering it engages in:

- A. A Brokerage Firm's investigation of the Issuer, its business, management, potential, etc.;
- B. Firm Compensation;
- C. Compliance with the NASD's Board of Governor's Interpretation on Corporate Finance;
- D. Consultation with the broker-dealer's financial principal regarding the net capital implications to the firm;
- E. Identification of potential Syndicate Members;
- F. The broker-dealer's role in the offering, whether as underwriter, co-underwriter, or syndicate member; and
- G. SEC, NASD, and state comment letters.

Further, during the offering process, the firm must:

- 1. Coordinate the commencement of sales, to assure that there are no offerings made until the appropriate time and the offering is made only in those states where registration has been effected for all concerned (Issuer, Firm and RR's) or the appropriate exemptions are available.
- 2. If a brokerage firm makes a market in the issuer's security, the firm must insure that the firm ceases trading, as appropriate, to assure that there is no violation of 1934 Act 10b-6.
- 3. Coordinate the offering to assure that the brokerage firm's net capital is sufficient and not negatively impacted.
- 4. Coordinate the delivery of prospectus (or other offering documents) (and for public offerings), compliance with the post-offering prospectus delivery requirements.

SALES OF CUSTOMER SECURITIES UNDER RULE 144 AND OTHER EXEMPTIONS FROM REGISTRATION

As sales of unregistered securities may subject a brokerage firm to "strict" liability, it is a typical brokerage firm policy not to engage in sales of such securities without appropriate scrutiny of each proposed transaction for Rule 144 compliance and the required Seller's Representation Letter and opinion of counsel to the Issuer and/or Seller are obtained.

ORDER FLOW, MARKET MAKING AND TRADING

Documentary Evidence of Reviews. Brokerage firms must comply with Article III, Section 27(c) of the NASD's Rules of Fair Practice. Therefore, firms have a policy that transactions must be approved by a Firm principal, and the relevant documents, order tickets, and blotters must evidence that review.

To assure that the oversight is properly being conducted, it is recommended that another principal of the firm randomly select a reasonable number of transactions and confirm the memorialization of the principal's approval, on a daily basis.

Transactional Review. Typically, a principal of the broker dealer will also review a percentage of each days transactions to get an overview of activity and uncover situations that warrant further inquiry. This review typically consists of a review of 1) order tickets; 2) P&S Blotter used by the Order Room or the clearing firm transaction blotter; and 3) the appropriate exception reports. The search is for the following indicia which will require further inquiry: 1) order errors; 2) inappropriate recommendations to customers or inappropriate trading in customer accounts; 3) trading by RR's or their families; 4) sales of control stock; and any unusually large transactions or group of transactions.

Order errors are sought out to assure accuracy of the transaction and a brokerage firm's books and records. "Errors" may also be the result of unauthorized trading, parking, placing profitable trades into certain accounts and removing unprofitable trades.

The firm's principals are also required to acquire a general knowledge of the reviewed customer accounts within his supervisory responsibility and his daily review should include the following (See also "Churning" below):

- Sales of the same security to a large number of an RR's customers is a "concentration" and may indicate broad recommendations without regard to suitability.
- Speculative security transactions in an account usually doing transactions in "Blue Chip" securities may raise issues relating to suitability.
- Frequent trading in the same accounts (or in the same securities) may indicate churning.
- Offsetting orders (Buy & Sell contemporaneously made may indicate matched orders or "wash" transactions).
- "Switching" the same security from account to account to account may be the result of parking.
- Trading in the accounts of RR's and their families when coupled with a general knowledge of a brokerage firm's research and corporate finance projects may indicate sales upon inside information, such concerns may also arise where the concentrated sales by groups of an RR's customers or groups of RRs.
- Coupled with new account documentation, a daily review of order tickets may reveal sales of control stock without Rule 144 or registration compliance. Large concentrated transactions in one issuer's securities may also be cause for inquiry to assure that no "control stock" issues are present.

"Churning" is Excessive trading in a customer's account by a Firm or an RR taken in the context of the customer's financial situation and investment objectives. It is a violation of Rule 10b-5 promulgated by the SEC. Brokerage Firms typically have procedures in place not only to prevent actual instances of churning but to detect instances where the accusation can be made by a customer, and typically attempt to secure the necessary documentation from the customer to confirm his/her authority for the high turnover ratio. This is usually in the form of an "activity letter" sent to the customer by the Compliance Department, informing the customer of the high level of activity in his or her account,

and offering to discuss the account with the customer. Such letters are an important part of the brokerage firm's compliance function, and should not be taken lightly by the customer who receives same.

While no one test is available to determine if an account has been churned, churning requires two elements, first, excessive trading, and second, control of the account by the Registered Representative. While it is beyond the scope of this text to examine the issue of control it should be sufficient to note that the customer must prove that the Registered Representative had actual or de facto control, i.e., where the customer simply agreed with the recommendations or advice of the Registered Representative, without question or perhaps understanding.

A general rule for the excessive trading aspect of a churning claim is a determination of the turnover rate of the account, where turnover rate is the total amount of purchases made in the account, divided by the average monthly equity in the account. That ratio is then annualized (by dividing the result by the number of months involved to get a per month ratio, and then multiplying that result by 12). An annualized turnover ratio of 6, which means that the equity in the account was invested 6 times in a year, is indicative, but not determinative, of churning.

Excessive Mark-Ups/Mark-Downs.

This topic is covered in a later document, called Markups/Markdowns

Options

Option transactions generally contain a higher degree of risk of loss to the customer, which is the other side of their potential for large gains. Because of the risk, there are often special rules and procedures for handling option accounts.

Various regulations require that customers receive option disclosure forms prior to entering into options transactions, and that the account be

specifically approved for options trading prior to the execution of any orders.

INSIDER TRADING

Insider trading, that is, buying or selling a security based upon information that material, and not publicly available, is a violation of the Federal Securities laws, and often leads to criminal prosecution, with front page headlines. Insider trading is a serious matter, and brokerage firms typically spend a great deal of time attempting to insure that its employees and customers do not engage in such practices.

Firms typically forbid their any officer, director or employee from trading, either personally or on behalf of others (such as client accounts managed by a brokerage firm), on material non-public information or communicating material non-public information to others in violation of the law.

Brokerage firm insider trading policies typically apply to every officer, director and employee and extends to activities within and outside their duties at a brokerage firm.

Questions regarding "insider trading" or what constitutes "material non-public information" are beyond the scope of this text, and have been the subject of numerous court decisions, including one where the author represented the defendant, **SEC v. Materia,** 745 F.2d 197 (2d Cir., 1984); 745 F.2d 197 (2d Cir. 1984), an employee of a financial printer who was accused of trading on inside information he obtained during the course of his employment.

Most brokerage firms will require a Compliance Officer to carefully monitor the firm's activities, and that of its clients, to attempt, to the extent possible, insider trading. Many firms have policies which prevent its employees from purchasing securities of their corporate finance clients, and industry professionals are cautioned to check with their compliance

department before placing a trade in a personal or family members account.

The Compliance Officer will typically review Reports/Confirmations produced by the firm and compare theme to internal "Restricted" and "Watch" lists for possible conflicts. Additionally, firms usually make periodic reviews of the brokerage firm's manual and computer files to assure they are secure or access has been restricted, as the case may be.

Insider trading by any Firm employee or associated person subjects nearly always renders him/her subject to Firm disciplinary action and immediate discharge.

SALES PRACTICES

The Sales Practices of a firm (what the firm says and sends to its customers, and how customer orders are solicitude and handled), are an active area of investigation by the regulatory bodies. Typically, the SROs are charged with the responsibility of reviewing sales practice issues, the NYSE for its member firms, and the NASD for its members.

In order to insure compliance with these procedures, most brokerage firms randomly select for review and review customer records maintained by its Registered Representatives on a monthly basis to assure that purchasers and sales are made in line with the customers' stated objectives and financial situation.

From a compliance point of view, if there is some peculiarity noted, the Registered Representative may be asked to give a written or oral explanation to the firm, and the firm may contact the customer to discuss his transactions. Careful notes should be made of these conversations, and, if practical, a confirming letter sent to the customer of the substance of the conversation.

Additionally, some firms, on a random basis, monitor all business telephone conversations of a brokerage firm's RRs for inappropriate sales practices.

PROHIBITED ACTS

NASD Rules prohibit any person associated with a brokerage firm to engage in private security transactions outside the scope of his employment without receiving prior written approval from a brokerage firm to so do. Should a brokerage firm give such permission, it is charged with supervising the associated person's conduct in that transaction or in obtaining the necessary executed disclosure that a brokerage firm is not involved. At the time of hiring, each new employee is required to sign a statement of the new employee's understanding of this Firm's procedures.

EXCESSIVE CUSTOMER TRADING

Discretionary Accounts

Many brokerage firms prohibit their Registered Representatives from handling accounts on a discretionary basis. However, those that do, often, and should, have very strict compliance procedures in place to monitor discretionary accounts, including

1. Ensure that all new account documentation necessary has been obtained. On the new account form write "DISCRETIONARY" in large letters.

2. Ensure that written authorization is obtained from the client evidencing a brokerage firm's discretionary authority (prior to trading), stating the type of transactions permitted.

3. A current list of all discretionary accounts is maintained by a Compliance Officer, and is usually posted in the order room for ready reference.

4. All discretionary orders are marked to indicate if discretion is or is not being exercised and all discretionary orders are to approved and initialed by a principal of the firm.

6. A review of the customer statement by a Compliance Officer for all discretionary accounts on a monthly basis. A review of the accounts should be done with a view toward uncovering unsuitable recommendations, excessive trading, unauthorized transactions, improper use of nominee accounts, unsuitable switching and selling below the break point for mutual funds, parking shares in customer accounts, making guarantees, and of course, misuse of client's funds or securities, as well as improper charges, and undue concentration of transactions in a single security.

7. That once a year, a brokerage firm should re-confirm with the client that the client still wishes a brokerage firm to have the authorization.

REVIEW OF CUSTOMER ACCOUNTS

As an added measure of protection, and in order to comply with various regulations, some of which have been discussed herein, most brokerage firms review not less than quarterly, 10% of a brokerage firm's active customer accounts, in light of their financial circumstances.

A log of such review is typically maintained noting which accounts have been reviewed and any problems cited. In conducting the review, the firm is looking for:

A. suitability of recommendation;

B. sharing in customer accounts;

C. churning;

D. free-riding by RR or associated persons;

E. non-prompt payment;

F. Regulation T violations - late payment;

G. excessively large positions;

H. substantial losses;

I. concentration of low-priced securities;

J. any unusual transaction;

ADVERTISING

SRO regulations require that brokerage firms pre-approve all advertising of a broker-dealer and all outgoing correspondence of its Registered Representatives. The approval should be in writing, even if only the Supervisor's initials on a copy of the letter or advertisement, and a copy should always be maintained by the Registered Representative, in the event questions arise later as to whether a particular letter was approved or not. Most brokerage-firms include quotes in the press, or interviews, and even Web pages, as advertisements, which must be pre-approved.

COLD CALLING

Cold calling, while having a poor reputation, is a legitimate and valuable marketing tool for brokerage firms, and provides a legitimate source of information for customers, provided the tool is not abused.

Several states now have statutes which specifically address cold calling, and Registered Representatives are encouraged to check with their compliance departments for the rules in all states where cold calls are going to be made, as well as for the rep's home state.

Let us know what you think of our web pages. Send comments to astarita@seclaw.com

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For further information call Mark J. Astarita at 212-269-1400.